

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## REGION IX

IN THE MATTER OF:  
Middlefield-Ellis-Whisman  
Superfund Site

)  
)  
) Docket No. 2000-05  
)  
)

UNDER THE AUTHORITY OF THE  
COMPREHENSIVE ENVIRONMENTAL  
RESPONSE, COMPENSATION, AND  
LIABILITY ACT OF 1980, 42 U.S.C.  
§ 9601, et seq., as amended.

) AGREEMENT AND  
) COVENANT NOT TO SUE  
)  
) Haury Properties IV  
)

**I. INTRODUCTION**

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and Haury Properties IV, a California limited liability company (collectively, the "Parties").

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq., and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

Haury Properties IV, ("Settling Respondent") is a California limited liability company with principal offices at One South Market Street, San Jose, CA 95113-2302. Settling Respondent is a party to a Purchase Agreement dated August 27, 1999, between George Fiegl, an individual, as Seller and Settling Respondent as Buyer for the purchase of the property generally known as 405 National Avenue, Mountain View, California, and described in Exhibit 1 of this Agreement (the "Property"). On December 31, 1999, Seller assigned all of his interest in the Purchase Agreement to 650 Management Corporation pursuant to Section 12.10 of the Purchase Agreement. Settling Respondent wishes to purchase the Property to redevelop the Property for commercial and/or research and development, to encumber the Property with mortgages and

deeds of trust securing loans to fund the construction and development of the property, and to thereafter lease and/or sell and otherwise use and enjoy the Property.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X, the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the Property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA of a substantial benefit, is in the public interest.

## **II. DEFINITIONS**

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
2. "Existing Contamination" shall mean:
  - a. any hazardous substances, pollutants or contaminants, present or existing on or under the Property as of the effective date of this Agreement;
  - b. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the effective date of this Agreement; and

- c. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the effective date of this Agreement.

3. "Parties" shall mean the United States on behalf of EPA, and the Settling Respondent.

4. "Property" shall mean that portion of the Site, encompassing approximately 1.173 acres, commonly referred to as 405 National Avenue, Mountain View, California, which is described in Exhibit 1 of this Agreement.

5. "Settling Respondent" shall mean Haury Properties IV, a California limited liability company.

6. "Site" shall mean the Middlefield-Ellis-Whisman ("MEW") Superfund Site, encompassing approximately 8 square miles of mostly industrial property located just south of the San Francisco Bay, in the city of Mountain View, California. The center of the Site is an industrial park bounded by Middlefield Road, Ellis Street, and Whisman Road, see Site map attached as Exhibit 2. The MEW Site includes all areas to which hazardous substances and/or pollutants or contaminants have come to be located and which originated from property within the area bounded by Middlefield Road, Ellis Street, and Whisman Road.

7. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

### **III. STATEMENT OF FACTS**

8. The Settling Respondent is a commercial real estate developer that plans to purchase property located within the MEW Site.

9. The Property is located in an area of mostly industrial property located in the Site in an area bounded by Middlefield Road, Ellis Street, and Whisman Road.

10. The Property is located in an area adjacent to Highway 101 with high visibility and is adjacent to one of the primary entrances to the City of Mountain View. The Property is presently blighted and the prospects for future development, improvement, and use of the Property is clouded by the presence of the Existing Contamination and the prospect that a purchaser of the Property would take on legal liability for the cost of remediating environmental contamination at the Property.

11. Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, as follows:

- a. It is the Settling Respondent's intention and desire to develop the Property and build improvements thereon for use of the Property as office and/or research and development space, and to thereafter lease and/or sell the Property.
- b. Local high technology and other businesses will be able to occupy the improvements constructed on the Property allowing them to expand their businesses in Silicon Valley.
- c. Settling Respondent's use of the Property is expected to expand the local tax base and create jobs for the local community.
- d. Settling Respondent is not, and has never been, named as a potentially responsible party at the Site.
- e. Settling Respondent's involvement with the Property and the Site has been limited to on site review of the Property, preparation of a Phase I Environmental Assessment, and contracting with Professional Services Industries, Inc., to certify the facilities closure report approved by the City of Mountain View Fire Department.

- f. Settling Respondent has not made any physical modification to the Property or any improvements thereon and has not caused to be released, transported, stored, or used any hazardous materials in, on, or about the Property or the Site.

#### **IV. PAYMENT**

12. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein, Settling Respondent agrees to pay to the EPA the sum of Seventy-Five Thousand Dollars (\$75,000.00) within 30 days of the date Settling Respondent receives notice that the Agreement is effective. The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing EPA Region IX, EPA Docket Number 2000-05, EPA Site Number 09M6, DOJ case number 90-11-2-244/2, and name and address of Settling Respondent. Payment shall be sent to:

U.S. EPA  
Region IX, Attn: Superfund Accounting  
P.O. Box 360863M  
Pittsburgh, PA 15251

Notice of payment (including a copy of the check and transmittal letter) shall be sent to those persons listed in Section XV, (Notices and Submissions), and to:

Catherine Shen  
Financial Management Specialist (PMD-6)  
U.S. EPA Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Attn: DJ # 90-11-2-244/2 (Wise)

13. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

#### **V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST**

14. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Property, and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, ("RCRA") et seq., and any other applicable statute or regulation, including any amendments thereto.

15. With respect to any Property owned or controlled by the Settling Respondent that is located within the Site, within 15 days after the effective date of this Agreement or the date of acquisition of any Property, whichever date is later, Settling Respondent shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, or Registry of Deeds or other appropriate office, Santa Clara County, State of California, which shall provide notice to all successors-in-title that the Property is part of the Site, and that potentially responsible parties are subject to an Administrative Order for Remedial Design and Remedial Action U.S. EPA Docket No. 91-4, or have entered into a Consent Decree requiring implementation of the remedy selected by the Record of Decision dated May 1989, as amended. Such notice shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of the case, and the date the Consent Decree was entered by the Court. The Settling Respondent shall record the notice within 10 days of EPA's approval of the notice. Settling Respondent shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

16. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property, or an interest in the Property, are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement.

## **VI. DUE CARE/COOPERATION**

17. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at

the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations of the Property by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

## **VII. CERTIFICATION**

18. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and

complete, the Agreement within the sole discretion of the United States, may be declared null and void by the United States, and the United States reserves all rights it may have.

#### **VIII. UNITED STATES' COVENANT NOT TO SUE**

19. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination.

#### **IX. RESERVATION OF RIGHTS**

20. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States reserves, and the Agreement is without prejudice to, all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by a Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs);
- b. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;
- c. any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

- d. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;
- e. criminal liability;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and
- g. liability for violations of local, State or federal law or regulations.

21. With respect to any claim or cause of action asserted by the United States, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

22. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

23. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Site, or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Settling Respondent acknowledges that it is purchasing Property where response actions may be required.

#### **X. SETTLING RESPONDENT'S COVENANT NOT TO SUE**

24. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or

causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities, except as reserved otherwise in Paragraph 25 of this Agreement.

25. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute pre-authorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

#### **XI. PARTIES BOUND/TRANSFER OF COVENANT**

26. This Agreement shall apply to and be binding upon the United States, and shall apply to and be binding upon the Settling Respondent, its officers, directors and employees. The United States' Covenant Not to Sue in Section VII and Contribution Protection in Section XVIII shall apply to Settling Respondent's officers, directors, or employees, to the extent that the alleged liability of the officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of Settling Respondent, and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Respondents. Each signatory

of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

27. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA in its sole reasonable discretion.

28. The Settling Respondent agrees to pay the reasonable costs incurred by EPA to review any subsequent requests for consent to assign or transfer the rights, benefits, and obligations conferred by this Agreement.

29. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA.

## **XII. DISCLAIMER**

30. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

## **XIII. DOCUMENT RETENTION**

31. The Settling Respondent agrees to retain and make available to EPA all business and operating records, contracts, Site studies and investigations, and documents relating to operations at the Property, for at least 10 years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of 10 years, the Settling Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

## **XIV. PAYMENT OF COSTS**

32. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment) of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

## **XV. NOTICES AND SUBMISSIONS**

33. All notices to Settling Respondent should be sent to:

Haury Properties IV, LLC  
One South Market Street  
San Jose, CA 95113-2302  
Attn: Ed Haury

With copies to:

Terra Law, LLP  
60 South Market St., Suite 200  
San Jose, CA 95113  
Attn: William Myers, Esq.

All notices to the United States should be sent to:

Regional Counsel  
U.S. EPA  
75 Hawthorne Street  
San Francisco, CA 94105  
Attn: EPA Docket # 2000-05

With a copy to:

Eugenia Chow  
Superfund Project Manager  
U.S. EPA  
75 Hawthorne Street  
San Francisco, CA 94105

Any party may change the address to which notices are to be sent or add names and addresses for notices by delivering written notice to the parties named herein.

#### **XVI. EFFECTIVE DATE**

34. If the Regional Administrator and the Assistant Attorney General approve this Agreement prior to the date Settling Respondent takes possession or control of the Property, and EPA does not withdraw or modify its consent to this Agreement after reviewing public comments, then the effective date of this Agreement shall be the date upon which Settling Respondent takes possession or control of the Property. If the Regional Administrator or the Assistant Attorney General does not execute this Agreement, or if EPA withdraws or modifies its consent to this Agreement after reviewing public comments, or Settling Respondent takes possession or control of the Property prior to the date the Regional Administrator and the

Assistant Attorney General approve this Agreement, then there is no Agreement and no effective date.

#### **XVII. TERMINATION**

35. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

#### **XVIII. CONTRIBUTION PROTECTION**

36. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination.

37. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

38. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on them.

## **XIX. EXHIBITS**

39. Exhibit 1 shall mean the description of the Property that is the subject of this Agreement.

40. Exhibit 2 shall mean the map depicting the Site.

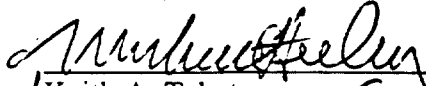
## **XX. PUBLIC COMMENT**

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations that indicate this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IX

BY:

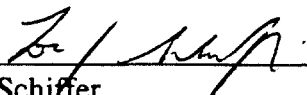
  
\_\_\_\_\_  
Keith A. Takata  
Director, Superfund Division

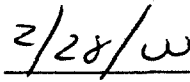
2/24/00  
Date

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:

  
\_\_\_\_\_  
Lois J. Schiffer  
Assistant Attorney General  
Environment and Natural Resources Division

  
\_\_\_\_\_  
Date

IT IS SO AGREED:

HAURY PROPERTIES IV, LLC  
A California Limited Partnership

BY:



Thomas G. Haury  
General Partner for Haury Properties IV, LLC

2-24-00

Date

## **Exhibit 1**

### **LEGAL DESCRIPTION OF PROPERTY**

A portion of Lot 33, Map of "Tract No. 2724, Ellis-Middlefield Industrial Park," recorded June 16, 1961 in Book 121 of Maps, at Page 40-44 and being more particularly described as follows:

Beginning at the Northwest corner of said Lot 33; thence from said Point of Beginning along the west line of said Lot, South 16 deg. 18' West 298.14 feet to the Southwest corner of said Lot; thence along the South line of said Lot South 77 deg. 18' 20" East 171.92 feet; thence leaving the last named line Easterly of and parallel to said Westerly line of Lot 33, North 16 deg. 18' East 294.93 feet to the North line of said Lot which is also the South line of National Avenue (60 feet wide) as shown of said Map; thence along said North line of Lot 33 in common with the said South line of National Avenue, the following courses and distances, North 73 deg. 42' West 112.17 feet; thence along a tangent curve to the left on a radius of 20 feet, through a central angle of 27 deg. 15' 58" an arc distance of 9.52 feet to a point of reverse curvature; thence along a curve to the right on a radius of 70 feet, through a central angle of 42 deg. 19' 14" an arc distance of 51.70 feet to the Point of Beginning.

**Exhibit 2**

**MAP OF MEW SUPERFUND SITE**